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Issue date: 01Oct2002

CASE NO.: 2002-LHC-1305

OWCP NO.: 01-132602

IN THE MATTER OF:

JAY S. BOROFSKY

v.

NEW HAVEN TERMINAL, INC.

Employer

and

LIBERTY MUTUAL GROUP

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

David A. Kelly, Esq.
For the Claimant

BEFORE: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER

This is a claim for a Section 22 Modification of compensation benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq.,

(herein the Act), brought by Jay S. Borofsky (Claimant) against New Haven Terminal, Inc. (Employer) and Liberty Mutual Grounp (Carrier). Claimant offered 13 exhibits which were admitted into evidence. This decision is based upon a full consideration of the entire record.[1]

On January 14, 1997, a Decision and Order was originally filed in this matter wherein Employer was granted 8(f) relief and Claimant was found (1) temporarily and totally disabled from January 6, 1995 to July 25, 1995, based upon his average weekly wage of $670.50; (2) permanently and totally disabled from July 26, 1995 to September 24, 1995, based upon his average weekly wage of $670.50; and (3) permanently and partially disabled from September 25, 1995 and continuing, based upon the difference between his average weekly wage at the time of the injury, $670.50, and his wage-earning capacity after the injury, $471.99. Judge Di Nardi found Section 8(f) relief appropriate and established continuing liability of the Special Fund after Employer's limited obligation of 104 weeks of permanent benefits.[2]

On March 3, 1997, a Decision and Order on Motion for Modification issued wherein Claimant's wage-earning capacity after the injury was reduced to $262.35.

On January 11, 2002, Claimant filed a timely Motion for Modification. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on August 1, 2002 in New London, Connecticut. All parties in attendance were afforded a full opportunity to adduce testimony and offer documentary evidence. No representatives for the Employer, Carrier, District Director or Regional Solicitor, on Behalf of the Trust Fund, appeared at the formal hearing.

Post-hearing briefs were not filed. Based upon the evidence introduced, my observations of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

Based upon the record, the Decision and Order of Judge Di

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___.

[2] The Special Fund became liable for Claimant's payments in or about July 1997. (Tr. 5).

Nardi as modified, and the original stipulations by the parties, I find:

1. The Act applies to this claim.

2. Claimant and Employer were in an employee-employer relationship at all relevant times.

3. Claimant was injured on January 6, 1995 while in the course and scope of his employment with Employer.

4. Employer was timely notified of the injury.

5. Claimant's average weekly wage at time of injury was $670.50.

6. Claimant was temporarily and totally disabled from January 6, 1995 to July 25, 1995.

7. Claimant was permanently and totally disabled from July 26, 1995 to September 24, 1996.

8. Claimant was permanently and partially disabled as of September 25, 1995 for which benefits were paid at $272.10 per week from September 25, 1995 until the present.

9. Medical benefits have been paid pursuant to Section 7 of the Act.

10. The date of informal conference was June 5, 2001.

11. No Employer Controversion was filed.

II. ISSUE

The unresolved issue presented by the parties is the extent of Claimant's disability.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified that he is 50 years old and obtained a

10th grade education. (Tr. 11). He was evaluated for a learning disability and was told that he has a fifth-grade reading level. Id. He was also told that he had learning disabilities after he finished his schooling. (Tr. 14).

Claimant worked with New Haven Terminal from about 1976 until 1995. Id. He typically engaged in unloading and loading ships and heavy equipment. Claimant started working at the Naval Terminal in the hold of the ship, hooking up massive loads of steel to cranes. (Tr. 15). He performed that task for six, eight, or ten years. During his employment at the Naval Terminal, Claimant joined a Longshoreman's Union. Id.

Claimant testified he was injured on or about January 6, 1995, and has been unable to work at New Haven Terminal since that time. Id. He returned to work after "a couple of therapies." Claimant eventually had to retire because he could no longer do his job. (Tr. 15-16). Specifically, he could no longer climb out of the ladders in and out of the hold. (Tr. 16). He treated with Dr. Homza, whose therapy included stretching, whirlpools, and other physical therapy. Id.

After his employment at the Naval Terminal, Claimant began working for Saugatuck Tree and Logging, a friend's company that engaged in clearing wooded lands and other tree work.[3] He ran one of their pieces of heavy equipment. Id. He was unable to work this job[4] 40 hours a week, five days a week, because of his pain. Specifically, he had to climb around equipment to fix it, grease it, or fuel it. (Tr. 17). Such physical manual labor was too difficult for Claimant to perform. Consequently, he was allowed the opportunity to perform services as a "gopher" instead of operating the equipment. (Tr. 18). Claimant stated businesses like New Haven Terminal would not have been as flexible with his work terms. (Tr. 17).

In January and February of 2001, Claimant felt much pain. (Tr. 18). Upon the advice of his doctor, Claimant took some time

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[3] Judge Di Nardi based his finding of Claimant's post-injury wage earning capacity on his earnings from "Saugatuck Tree Service." (EX-2, pp. 25-26).

[4] Dwight Smith, president of Saugatuck Tree and Logging (Saugatuck), provided an undated letter discussing Claimant's ability to work. (CX-3). Mr. Smith stated Claimant incurred no new injuries during the time he worked for Saugatuck, but Claimant's condition in his back and neck nonetheless "got worse to the point [Claimant] was unable to do the job at all." Mr. Smith noted that efforts were made to give Claimant lighter duties, but Claimant was unable to perform those duties as well. Id.

off in February 2001 and went to Florida for a couple of months. Upon his return, he tried to go back to work for Saugatuck, which "created a couple of jobs" for him. He drove a truck to deliver mulch and to "run for parts." When the truck was filled with mulch, Claimant had to climb up the truck and pull a tarp manually down the tail gate. (Tr. 18-19). Then, he had to climb down the truck and fasten the tarp. Such work was eventually too painful for Claimant, who quit working for Saugatuck around July 3, 2001. Id.

Claimant approached J. M. Candee Sanitation and asked to drive a garbage truck for the company. (Tr. 19). Candee agreed to let him drive, but the task was too demanding[5] of Claimant, who would have to take breaks. Candee then had to drive the truck in place of Claimant. Candee never paid Claimant for his attempt to work (Tr. 19). Since his unsuccessful tenure with Candee, Claimant does not know of any other job that he has done in the past that he would now be able to perform.

Claimant testified that he has pain from his neck to his legs. His right arm causes him problems, including excruciating pain down his whole arm every day. He cannot sleep because of the pain in his arm. Claimant stated the doctors do not know what is wrong with his arm. Because of his physical condition, he cannot do anything involving physical activity. (Tr. 20-21). He no longer enjoys riding his motorcycle because of excruciating pain. (Tr. 21).

Because he is in much pain, Claimant is taking Ultracet and Flurazepam for pain. (Tr. 12). He is taking Prevacid, Flomax, and Proscar for urinary and prostate problems. Because of the medicines, he has problems eating, urinating, and accomplishing other bodily functions. (Tr. 12-13). The medicines affect his memory and ability to function. (Tr. 13). Because the medicines affect his stability, Claimant's coordination is off and he falls into walls and doors, downstairs and upstairs. Claimant stated he took OxyContin in the past, but has since stopped, pursuant to the doctor's advice. Id.

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[5] J. Michael Candee, president of J.M. Candee Sanitation, provided an undated letter wherein he discussed Claimant's ability to work. (CX-3a). Mr. Candee stated he tried to find a job within Claimant's work capability. Although Claimant "tried hard to perform the job, it was beyond his physical capability." Mr. Candee observed:

> I could tell that [Claimant's] neck and back problems prevented him from successfully performing the job even though we tried to lighten up the requirements.

Id.

The Medical Evidence

Dr. Howard B. Kaplan, M.D.

On May 3, 2002, Dr. Kaplan prepared a report of his treatment of Claimant. (CX-4). Dr. Kaplan stated that he had been treating Claimant for persistent pain and limitation of motion that Claimant sustained from an accident dating back to 1988. Since that time, Dr. Kaplan noted that Claimant sought treatment from Dr. Homza.[6] According to Dr. Kaplan, Dr. Homza felt in 1995 that Claimant had a 10% permanent partial impairment of his cervical spine, a 5% impairment of the low back, and was incapable to do anything but light duty. Dr. Kaplan opined Claimant's disability since 1995 has become increasingly more painful and worsened such that Claimant may no longer function in any capacity. Dr. Kaplan added that he has been treating Claimant with ongoing and increasing medications. Lastly, Dr. Kaplan agreed with Dr. Homza's opinion that Claimant could not presently do any work whatsoever and that Claimant should be considered totally disabled from the trade in which Claimant previously worked. Id.

Dr. Mark Thimineur, M.D.

On June 20, 2001, Dr. Thimineur, a pain specialist, examined Claimant and provided a new patient evaluation. (CX-5). Dr. Thimineur's impression of Claimant included "chronic back, neck, right arm and right leg pain." Id., p. 5. Dr. Thimineur identified Claimant as a "49-year-old white male with a probable neurologic injury related to past traumas." He discussed Claimant's psychological and behavioral assessment and intervention. He provided options for psychological interventions which included individual psychological counseling, biofeedback, neurofeedback, cognitive retraining, group therapy, and a supervised pain support group. Specific recommendations were deferred pending further studies and data analysis. Id., p. 6.

Dr. Thimineur also discussed pain treatment options. Specifically, he stated there are many options available to treat Claimant's chronic pain, including behavioral therapies, physical therapy, physical conditioning and medications. According to Dr. Thimineur, a wide variety of medications could be employed, including opiate-based drugs. Likewise, he noted that temporary ambulatory infusions of intravenous medications could be considered if response to more conservative medical management

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[6] According to Counsel for Claimant, Dr. Homza retired on or about February 24, 2001 and Claimant undertook care with Dr. Kaplan, his family doctor. (Tr. 8).

would be insufficient. Id.

Dr. Thimineur also mentioned there were non-surgical techniques of intervention including spinal injection techniques, nerve blocks, joint injections, and neurolytic treatments. According to Dr. Thimineur, surgical interventions are generally reserved for the most intractable pains which fail to adequately respond to more conservative care. Such interventions available included: (1) epidural or peripheral neurostimulator implants; and (2) implants of intrathecal catheter and pump systems to administer neuraxial opiates, clonidine, local anesthetics, NMDA, antagonists, and others. Id.

Dr. Thimineur concluded his new patient evaluation with a recommendation for an MRI of the cervical spine. Id. The record does not contain the results of the recommended MRI.

Dr. Enzo J. Sella, M.D.

On April 29, 2002, Dr. Enzo Sella provided a medical examination of Claimant. (CX-6, pp. 1-4). Dr. Sella identified Claimant's chief complaints as: (1) severe low back pain which "never goes away;" (2) pain in the right side of his neck; (3) inability to raise his right arm; (4) numbness in his right leg; and (5) left buttock pain since January 6, 1995. (CX-6, p. 1).

Dr. Sella discussed Claimant's history of present illness. Dr. Sella noted that Claimant recalled multiple injuries since the mid-80's. The first accident concerned a fall into a door jam, injuring the right side of Claimant's neck. His second injury involved unconsciousness from slipping on ice and hitting his head on the deck of a ship. The third injury involved a twisting back injury incurred during Claimant's operation of a forklift machine that tilted. The fourth injury involved a floor which collapsed, resulting in Claimant's fall. Dr. Sella noted that Claimant went to work for a tree and logging company using heavy equipment, but Claimant lasted only a year after being put on light duty mainly making deliveries. Id.

Dr. Sella reviewed Claimant's medical records. (CX-6, pp. 1-2). He noted a report by "Dr. Holmes" dated January 9, 1995. (CX-6, p. 1). There, Dr. Sella concluded that "Dr. Holmes" felt that Claimant had acute lumbar sprain caused by the fall on the ship's icy deck. On January 26, 1995, Claimant had a low back testing which showed a range of motion deficit in all planes, and isometric strength scores showed a moderate deficit in the lumbar flexion. Dr. Sella noted that "Dr. Holmes" continued following Claimant. Dr. Sella found that a urologist concluded Claimant probably had a neurogenic bladder related to his back injury. (CX-6, p. 2).

Dr. Sella noted Claimant began seeing Dr. Goodman on May 26, 1995. Id. According to Dr. Sella, Dr. Goodman referred to a 1988 injury involving a fall by Claimant. Dr. Sella noted the medical record reflected two MRIs of Claimant's lumbar spine performed on October 9, 1989 and on July 16, 1993, respectively. Dr. Sella noted both MRIs were normal; however, an MRI of the cervical spine done on August 5, 1993, showed degenerative changes at all levels with minimal disc herniation at C5 and C6. Id.

Claimant then saw Dr. Robinson, a neurosurgeon, who opined Claimant's symptoms were muscular ligamentous in nature both in the neck and in the lower back. Id. Dr. Sella noted Dr. Goodman found that earlier X-rays were unremarkable and that he felt the symptoms were most likely related to "insufficiency of the muscles and ligamentous structures of lumbar spine." According to Dr. Sella, the medical records reflected that Dr. Goodman gave Claimant 9% impairment and loss of function of the lumbar spine and stated that Claimant could only do light work and could not do any work as a longshoreman. Id.

Upon physical examination, Dr. Sella noted that Claimant was 5'8" tall and weighed 230 pounds. (CX-6, p. 3). Palpitation of Claimant's cervical spine was soft non-tender. Dr. Sella noted pain on Claimant's extension and rotation right and left as well as lateral tilting. He found Claimant had decreased sensation in his right arm when tested with a pin. Claimant had difficulty getting up from the flexed position and could extend to about 20 degrees with pain. According to Dr. Sella, Claimant's straight leg raising was positive bilaterally producing pain in the S1 nerve root distribution. Claimant exhibited decreased sensation along the right leg along the S1 nerve root distribution. Dr. Sella noted that there was some tenderness on palpitation in the right shoulder, but the pain was localized to the biceps. Further, Dr. Sella noted that there was no pain in the dome of the shoulder in the rotator cuff area. Id.

Dr. Sella's impression of Claimant included chronic muscular ligamentous sprain/strain syndrome of the cervical spine with most likely degenerative disc disease of the cervical spine and chronic lumbosacral sprain strain syndrome with degenerative disc disease of the lumbar spine. Id.

Dr. Sella initially concluded that Claimant was overweight and deconditioned. He recommended treatment focused on losing weight and reconditioning Claimant by way of improved diet and increased exercise. (CX-6, p. 4) Dr. Sella did not feel there should be any formal structured physical therapy because that had not historically helped Claimant. He determined that Claimant was at maximum medical improvement at the time of his report, April 29, 2002. Dr. Sella finally concluded that Claimant did

not need any pain management because Claimant knew what his symptoms were. He added that Claimant should discontinue OxyContin in favor of non-narcotic analgesics and muscle relaxants. Id. Dr. Sella did not render an opinion about Claimant's capacity to work or place any restrictions on Claimant.

On May 15, 2002, Dr. Sella prepared a letter summarizing his impressions of Claimant. (CX-7). Dr. Sella stated that his impression of Claimant was that Claimant had a 14% impairment and loss of function of the lumbar spine. He found that it was difficult to apportion all of Claimant's injuries but would estimate that 5% of Claimant's 10% impairment was due to the injury sustained in 1995. Dr. Sella felt that most of Claimant's symptoms are related to his lumbar spine and he could not determine how much of any neck pain could be attributed to the 1995 injury. Dr. Sella's impression was that probably none of the neck pain was due to the 1995 injury, but he could not be sure from the records he reviewed. Id.

Dr. L. Ronald Homza, M.D.

On July 25, 1995, Dr. Homza examined Claimant. (CX-9). Dr. Homza examined Claimant at Claimant's request, because Claimant had to "do something" to get to work. (CX-9, p. 1). Claimant complained of his pain which was aggravated by doing anything for any length of time. Dr. Homza noted Claimant complained of stiffness in the neck and of pain in his low back radiating into his right lower limb. Id.

Dr. Homza reviewed reports from Dr. Goodman and Dr. Robinson dated May 26, 1995 and November 29, 1993 respectively. Id. According to Dr. Homza, both of those reports indicated Claimant's problems are work-connected from repetitive injuries on the docks through the years. Dr. Homza noted that Dr. Robinson gave Claimant a 10% permanent partial disability of the neck and a 5% permanent partial disability of the back, while Dr. Robinson did not mention whether Claimant could return to work on the docks. Dr. Homza stated that Dr. Goodman felt Claimant's problems were directly related to his spine insults at work. According to Dr. Homza, Dr. Goodman concluded that Claimant suffered a permanent partial impairment of the lumbar spine of 9%. Dr. Homza noted that Dr. Goodman felt that Claimant was capable of doing light duty work not requiring more than occasional lifting of 20 pounds and regular lifting of 10 pounds. Both Drs. Robinson and Goodman felt that Claimant did not need active treatment when they saw him. Id.

Dr. Homza then concluded Claimant was essentially unchanged from his earlier examinations on June 6, 1995 and April 25, 1995. Dr. Homza noted that Claimant reported constant pain in his low

back radiating into his right lower limb and pain in his neck while walking. Dr. Homza stated he did not disagree with the independent medical examinations of Dr. Robinson or Dr. Goodman.

Dr. Homza believed Claimant's continuing problems with persistent pain and limitation of motion would keep him from returning to the docks in any capacity. Id. at 2. He opined that Claimant should not attempt to lift more than 20 pounds occasionally and could try to lift 10 pounds frequently with questionable success. Dr. Homza concluded that Claimant could stand, sit, and walk for an 8-hour shift, but should not perform any one of those activities for the full eight hours. Dr. Homza stated Claimant's pain was high enough to preclude him from being a good student to retrain. Dr. Homza could not foresee Claimant using or driving heavy equipment because Claimant would be a hazard not only to himself but to his fellow workmen. Id.

Dr. Alan Goodman, M.D.

On May 26, 1995, Dr. Alan Goodman performed an orthopedic evaluation of Claimant. (CX-10). He observed that the etiology of Claimant's continuing difficulty is obscure and that a specific diagnosis could not be made with any assurance. Id. at 3. He stated that Claimant's chronic low back pain may be related to chronic lumbar strain with no evidence that he suffers from radiculopathy. He noted the cause of Claimant's urinary dysfunction should be elicited from Claimant's genitourinary specialist. Id.

Dr. Goodman felt Claimant's prognosis was poor and Claimant would probably suffer intermittent episodes of incapacitating low back pain and paresthesias into the indefinite future. Dr. Goodman opined Claimant's low back pain was directly related to the accidents which he experienced during the course of his work in 1989, 1990, 1995. At the time of the report, Dr. Goodman believed Claimant did not require active medical intervention for his lumbar spine problem, which could be managed with an independent program of therapeutic exercise supplemented by heat and analgesic medication. Id. at 3-4. Dr. Goodman opined that Claimant had reached a point of maximum medical improvement regarding his lumbar spine. Id. at 4. He did not believe Claimant could continue working as a longshoreman and should be entered into a vocational rehabilitation program to train for less demanding physical work.

Dr. Goodman also noted that Claimant complained of chronic discomfort in his neck, which was less a limiting factor than Claimant's lumbar spine problem. Dr. Goodman concluded the problem would probably best be managed by vocational rehabilitation to less demanding physical work. Id.

On June 30, 1995, Dr. Goodman prepared a letter in which he stated Claimant suffers from a permanent partial impairment of function of the lumbar spine of 9%. (CX-11). He added the Claimant could not do the work of a longshoreman and could do light work only. Such light work requires the occasional lifting of 20 pounds and the regular lifting of 10 pounds, permitting work in a variety of postures but not awkward postures. Dr. Goodman concluded Claimant reached a point of maximum medical improvement at that time. Id.

The Contentions of the Parties

Claimant contends modification of Judge Di Nardi's previous Amended Order in this case is appropriate because his physical condition has deteriorated since the original award, and Dr. Kaplan opines he is now permanently and totally disabled. Claimant seeks permanent and total disability from July 3, 2001 to the present and continuing.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant.[7] However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[8]

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.[9]

Section 22 of the Act permits any party-in-interest to request modification of a compensation award for mistake of fact

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[7] Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

[8] Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

[9] Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

or change in physical or economic condition.[10] The rationale for allowing modification of a previous compensation award is to render justice under the Act. Congress intended Section 22 modification to displace traditional notions of res judicata, and to allow the fact-finder, within the proper time frame after a final decision and order, to consider newly submitted evidence or to further reflect on the evidence initially submitted.[11]

The administrative law judge, as trier of fact, has broad discretion to modify a compensation order.[12] The administrative law judge has the authority to reopen the record and correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted.[13]

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding.[14] The concept of mistake in determination of facts includes mixed questions of law and fact, but it does not include questions of strictly law.[15] A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making.[16]

Modification may be granted when the claimant's physical condition has improved or deteriorated following entry of the compensation award.[17] The party requesting modification has the burden of proof in showing a change in condition.[18] The Section 20(a) presumption is inapplicable to the issue of whether the

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[10] See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291 (1995).

[11] Hudson v. Southwestern Barge Fleet Services, 16 BRBS 367 (1984).

[12] O'Keefe v. Aerojet-General Shipyards, 404 U.S. 254, reh'g denied, 404 U.S. 1053 (1972).

[13] Id.

[14] O'Keefe, supra.

[15] McDougall v. E.P. Paup Co., 21 BRBS 204 (1988).

[16] O'Keefe, supra; see also General Dynamics Corp. v. Director, OWCP, 673 F.2d 23 (1st Cir. 1982).

[17] Rizzi v. Four Boro Contracting Corp., 1 BRBS 130 (1974).

[18] See Vasquez v. Continental Maritime, 23 BRBS 428 (1990).

claimant's condition has changed since the prior award.[19] However, once a claimant establishes he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which the claimant is capable of performing and which he could secure if he diligently tried.[20] Moreover, the parties may not revisit the issue of causal relationship on a motion for modification because the claimant's condition has improved or deteriorated.[21]

A party also may request modification when the claimant's economic circumstances have changed. There are two economic changes that permit a modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable are not suitable or (2) the employer contends that suitable alternative employment has become available.[22] The standards for establishing suitable alternative employment apply in a modification proceeding.[23]

After the original hearing and modification in 1997, ALJ Di Nardi issued an Order finding Claimant permanently and partially disabled, based upon the difference between his average weekly wage at the time of the injury, $670.50, and his wage-earning capacity after the injury, $262.35. Claimant maintains that he has since become totally disabled, as evidenced by his testimony and the medical opinions of record. Thus, Claimant seeks to demonstrate modification is appropriate under Section 22 because his physical condition has changed.

When a party seeks modification based on a change in physical condition, an initial determination must be made as to whether the petitioning party has met a threshold requirement of offering evidence demonstrating that there has been a change in the claimant's condition.[24] This initial inquiry does not involve a weighing of the relevant evidence of record, but rather

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[19] Leach v. Thompson's Dairy, Inc., 6 BRBS 184 (1977).

[20] New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Air America v. Director, 597 F.2d 773 (1st Cir. 1979); American Stevedore, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Preziosis v. Controlled Industries, 22 BRBS 468, 471 (1989); Elliot v. C & P Telephone Co., 16 BRBS 89 (1984).

[21] Id.

[22] Blake v. Ceres, Inc., 19 BRBS 219 (1987).

[23] Id.

[24] Jensen v. Weeks Marine, Inc., 34 BRBS 147, 149 (2000); see also Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993).

is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, then the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding.[25]

Claimant offered his testimony and the medical reports of Drs. Kaplan, Thimineur, and Sella, along with previous employers' letters as newly submitted evidence in support of Claimant's position that his condition has deteriorated since the modified award. Dr. Kaplan opined that Claimant's disability since 1988 has become increasingly more painful and worsened such that Claimant may no longer function in any capacity. Dr. Kaplan added that Claimant could not presently do any work whatsoever and should be considered totally disabled from the trade in which he previously worked. Dr. Thimineur also noted Claimant's complaints of pain and discussed various treatments available. Dr. Sella also noted Claimant's pain and stated that Claimant suffers a 14% impairment to his lumbar spine, 5% to 10% of which was due to the injury sustained in 1995, an increase from the 1995 impairment assigned by Dr. Goodman. Meanwhile, previous employers observed Claimant suffered no new injuries on their jobs but he continued to feel increasing and disabling pain. This newly submitted evidence is sufficient to bring the claim within the scope of Section 22.[26] Consequently, Claimant meets the threshold requirement by offering evidence demonstrating that there has been a change in his condition.

When a claim is properly brought under Section 22, an administrative law judge must consider all the relevant evidence of record and render findings of fact supported by substantial evidence regarding the claimant's physical condition, providing reasons for crediting or discrediting the evidence submitted by both parties.[27]

Extent of Claimant's Disability

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[25] Jensen, supra; Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 31 BRBS 54 (CRT) (1997); Delay v. Jones Washington Stevedoring Co., 31 BRBS 197, 204 (1998); Vasquez, supra.

[26] See Jensen, supra.

[27] See Jensen, supra; see also Wynn v. Clevenger Corp., 21 BRBS 290 (1988); Dobson v. Todd Pacific Shipyards Corp., 21 BRBS 174 (1988).

A worker entitled to permanent partial disability for an injury arising under the schedule provisions of the Act may be entitled to greater compensation under Sections 8(a) and (b) by showing that he is totally disabled.[28] Unless he is totally disabled, the claimant is limited to compensation provided by the appropriate schedule provision.[29] The extent of disability cannot be measured by physical or medical condition alone.[30] Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury.[31] Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment.[32]

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment.[33] To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried.[34] For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability.[35] A failure to prove suitable alternative employment results in a finding of total disability.[36]

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[28] Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 277 n. 17, 14 BRBS 363, 366-367 n. 17 (1980).

[29] Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

[30] Nardella v. Campbell Machine, Inc., 525 F.2d 46 (9th Cir. 1975).

[31] American Mutual Insurance Company of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970).

[32] Id. at 1266.

[33] Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991).

[34] New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979).

[35] Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988).

[36] Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

At this initial stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment.[37] The claimant's medical restrictions must be compared with the specific requirements of his usual employment.[38] The claimant's credible complaints of pain alone may be enough to meet his burden.[39]

In the instant case, Claimant established he cannot return to work as a longshoreman. He provided uncontroverted testimony of excruciating pain from his neck to his legs that limits his ability to do anything involving physical activity. He testified that he does not know of any job he can perform. Further, he stated the drugs he takes for pain adversely affect his coordination such that he falls regularly.

Claimant's testimony is buttressed by the opinion of Dr. Kaplan, who concluded Claimant's condition has become increasingly more painful and worse such that Claimant may no longer function in any capacity. Likewise, Dr. Thimineur concluded Claimant suffered a probable neurologic injury related to past traumas and discussed a variety of treatments for Claimant's chronic pain, including behavioral therapies, physical therapy, physical conditioning, medications such as opiate-based drugs, surgical and non-surgical techniques of intervention. Dr. Sella's impression of Claimant included chronic muscular ligamentous sprain/strain syndrome of the cervical spine with most likely degenerative disc disease of the cervical spine. Dr. Sella also found chronic lumbosacral sprain/strain syndrome with degenerative disc disease of the lumbar spine. Accordingly, based on Claimant's testimony and the opinions of Drs. Kaplan, Sella, and Thimineur, Claimant cannot return to work as a longshoreman.

Likewise, Judge Di Nardi found Claimant totally disabled from longshore work based on the 1995 physicians' opinions which establish Claimant cannot return to work as a longshoreman. On June 30 1995, when Dr. Goodman described Claimant's chronic low

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[37] See Elliot, supra; Manigault v. Stevens Shipping Co., supra; Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988).

[38] Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988); Mills v. Marine Repair Serv., 21 BRBS 115, on recon., 22 BRBS 335 (1988); Carroll v. Hanover Bridge Marine, 17 BRBS 176 (1985); Bell v. Volpe/Head Constr. Co., 11 BRBS 377 (1979).

[39] Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); Richardson v. Safeway Stores, 14 BRBS 855 (1982); Miranda v. Excavations Constr., 13 BRBS 882, 884 (1981); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

back pain, he opined Claimant suffered from a permanent partial impairment of function of the lumbar spine of 9% and was at maximum medical improvement at that time. Dr. Goodman opined Claimant's problems were directly related to work traumas and precluded Claimant from working as a longshoreman. Dr. Goodman's prognosis of Claimant was poor and he thought Claimant would probably suffer intermittent episodes of incapacitating low back pain and paresthesias into the indefinite future. Likewise, Dr. Homza opined that Claimant had a 10% permanent partial impairment of his cervical spine as well as a 5% impairment of the low back. Dr. Homza further opined Claimant's persistent pain and limitation of motion would preclude him from returning to the docks in any capacity. Further, Dr. Homza felt Claimant's pain would preclude him from being a good student to retrain, and he did not foresee Claimant driving heavy equipment because Claimant would be a hazard to himself and others. Consequently, the 1995 opinions are consistent with the recent opinions and they establish Claimant meets his initial showing of total disability because he is unable to return to his former employment.

Because Claimant meets his initial showing of total disability, the burden shifts to the employer to show suitable alternative employment. If the employer does not carry this burden, Claimant is entitled to a finding of total disability.[40] Neither the employer, its carrier, or the District Director/Regional Solicitor submitted any evidence as to the availability of suitable alternative employment. Consequently, I find Claimant suffers a total disability. Moreover, because Claimant has been unable to engage in gainful employment since July 3, 2001, I find that he is entitled to permanent and total benefits for his disabling injury as of July 3, 2001.

V. COST OF LIVING INCREASES

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Accordingly, upon reaching a state of permanent and total disability on July 3, 2001, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year, and shall commence October 1, 2001.[41] This increase shall be the lesser of the

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[40] American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Southern v. Farmers Export Company, 17 BRBS 64 (1985).

[41] See Trice v. Virginia International Terminals, Inc., 30 BRBS 165, 168 (It is well established that claimants are entitled to Section 10(f) cost of living adjustments to compensation only during periods of permanent total disability, not temporary total disability); Lozada v. Director, OWCP, 23 BRBS 78 (CRT) (2d Cir.

percentage that the national average weekly wage has increased from the preceding year or five percent, and shall be computed by the District Director.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments.[42] The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due.[43] The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "... the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills ...."[44] This order incorporates by reference this statute and provides for its specific administrative application by the District Director.[45] The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Further, interest may be charged against the Special Fund where the Fund had the use and income from the use of the compensation due claimant.[46] In Grace v. Jacksonville Shipyards, Inc., the BRB held the Special Fund liable for the payment of interest on installments past due and explained:

> The decisive factor in determining liability for the six percent interest charge is which party 'had the use and the income' from the use of claimant's compensation

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1990) (Section 10(f) entitles claimants to cost of living adjustments only after total disability becomes permanent).

[42] Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974).

[43] Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979).

[44] Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

[45] See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985).

[46] See Maltese v. Universal Terminal & Stevedoring Corp., 12 BRBS 123 (1979).

> payments beyond the time when they were due. It is not important that the party had no knowledge of its liability for making compensation payments. If that party is ultimately held responsible for past payment compensation payments, then such party is liable in addition for the interest that attaches to the back payments.[47]

Moreover, because the Special Fund is not the property of the United States and its assets are not a part of the general revenues, the principle that interest on claims against the government is not recoverable unless expressly authorized by statute is not applicable to the Special Fund.[48]

VII. ATTORNEY'S FEES

No award of attorney's fees for services to Claimant is made because no application for fees has been submitted by Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[49] A service sheet showing that service has been made on all parties, including theClaimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.

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[47] 10 BRBS 945, 948 (1979). See Still v. Todd Pac. Shipyards, 14 BRBS 890, 893 (1982) (The BRB affirmed an assessment of interest against the Special Fund, which had the use and income from the use of money properly owed to claimant, including interest on the use of unpaid Section 10(f) adjustments).

[48] See Lawson v. Atlantic & Gulf Stevedores, 9 BRBS 855, 859 (1979); Lewis v American Marine Corp., 13 BRBS 637, 640 (1981); Olson v. Brady Hamilton Stevedore Co., 13 BRBS 733 (1981).

[49] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **March 5, 2002**, the date the matter was referred from the District Director.

The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. The Special Fund established in Section 44 of the Act shall pay Claimant compensation for permanent total disability from July 3, 2001 to present and continuing thereafter based on Claimant's average weekly wage of $670.50, in accordance with the provisions of Section 8(a) of the Act.

2. The Special Fund shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2001, for the applicable period of permanent total disability.

3. Employer/Carrier shall continue to pay all reasonable, appropriate and necessary medical expenses arising from Claimant's January 6, 1995 work injury, pursuant to the provisions of Section 7 of the Act.

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. The Special Fund shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 1st day of October, 2002, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge